FOR ARGUMENT

Supreme Court, U. S.
FILED
APR 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-255

HAZELWOOD SCHOOL DISTRICT, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-255

HAZELWOOD SCHOOL DISTRICT, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus*

The American Civil Liberties Union

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* Letters of consent to the filing of this brief, from counsel to the petitioners and counsel for the United States, will be lodged with the Clerk of the Court.

is a nationwide, non-partisan organization of over 250,000 members dedicated solely to defending the guarantees of the Bill of Rights. Central among those guarantees is the right of all persons to equal treatment under the law. In a variety of cases before this Court and other tribunals, the ACLU has defended the rights of those who have been discriminated against because of their race. We have also urged the broad power of Congress to seek to remedy the causes and effects of such prohibited discrimination.

The issues in this case involve the constitutional power of Congress to deal with discrimination in employment by state and local agencies. For the reasons set forth in Point II, infra, we believe that Congress has such power. But, as we suggest in Point I, infra, we do not think that it is necessary for the Court to reach such issues. We believe that the record as a whole reflects purposeful racial discrimination of the kind which violates constitutional guarantees, thus rendering unnecessary consideration of whether the different standards of Title VII can constitutionally be applied to state and local governmental bodies.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth by the parties, we submit that this case also involves the Thirteenth Amendment to the

Constitution, which provides, in pertinent part, as follows:

> "SECTION 1. Neither slavery nor involuntary servitude...shall exist within the United States, or any place subject to their jurisdiction.
>
> SECTION 2. Congress shall have power to enforce this article by appropriate legislation."

Statement of the Case

This case involves a Court of Appeals ruling that the Hazelwood School District was guilty of racial discrimination in its employment practices, pursuant to Title VII of the Civil Rights Act of 1964, as amended.

SUMMARY OF ARGUMENT

I.

This Court need not resolve questions concerning the proper reach of the 1972 amendments to Title VII because, on the basis of the record, the Court of Appeals was justified in finding that Hazelwood had engaged in intentional racial discrimination in the hiring of its teachers.

Statistical evidence showing a racially discriminatory effect can be relied on to establish a racially discriminatory purpose, particularly when a challenge is being made to a policy of discrimination, and where the evidence, in addition to showing statistical disparity, also indicates a history of past discrimination and subjective selection procedures which afford the opportunity for racial discrimination. Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corp., ___ U.S. ___, 45 U.S.L.W. 4073 (Jan. 11, 1977); Casteneda v. Partida, ___U.S.___, 45 U.S.L.W. 4302 (March 23, 1977). Accordingly, Hazelwood was not found to have engaged in racial discrimination solely because of "disproportionate racial impact."

Moreover, the evidence conclusively established that Hazelwood was practicing intentional racial discrimination, in that it had imposed a maximum quota on the percentage of black teachers it would hire, coinciding with the percentage of black students enrolled in its schools.

Since the evidence thus shows that Hazelwood was practicing intentional racial discrimination in the hiring of its teachers, there is no issue of substance to be reviewed by this Court, and the writ of certiorari should be dismissed as having been improvidently granted.

II.

It is within the power of Congress to prohibit what it has found to constitute racial discrimination in employment when practiced by state and local governments in the same manner as when practiced by private employers.

A. Implementation of the national policy of equal employment opportunity established by Title VII and extended to state and local governments by the Equal Employment Opportunity Act of 1972 requires that state and local governments be made subject to the provisions of Title VII in the same manner as private employers. The thrust of this policy is directed to the "consequences of employment practices, not merely the motivation." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). If this Court were to hold that Title VII cannot constitutionally be applied to employment practices of state and local governments absent a showing that they were motivated by a racially discriminatory purpose, c.f., Washington v. Davis, 426 U.S. 229 (1976), the national policy of equal employment opportunity would be completely undercut, and state and local governments would be free to engage in what Congress has proscribed on the part of private employers. Before this Court holds that such an anomalous result is required by the Constitution, it must satisfy itself that Congress may not, under the exercise of any of its enumerated powers, prohibit discrimination in employment when engaged in by state and

local governments in the same manner as when engaged in by private employers.

B. As applied to state and local governments, Title VII is a valid exercise of the commerce power, because its provisions do not improperly impair the exercise of "state sovereignty." The "state sovereignty" exception to the otherwise plenary power of Congress over interstate commerce that was recognized in National League of Cities v. Usery, 426 U.S. 833 (1976), only applies to interference with "essential decisions regarding the conduct of integral governmental functions." The exercise of "state sovereignty" does not require that the states practice what Congress has found to constitute racial discrimination. The application of Title VII to state and local governments will not impose substantial increased costs on the carrying out of governmental functions, nor will it "displace state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." Since this is so, the "state sovereignty" exception of Usery is inapplicable, and Congress may proscribe racial discrimination when practiced by state and local governments in the same manner as when practiced by private employers. Fry v. United States, 421 U.S. 542 (1975); United States v. California, 297 U.S. 175 (1936).

C. Insofar as Title VII prohibits discrimination on the basis of race, it

may be sustained in its application to state and local governments under the powers granted to Congress by §2 of the Thirteenth Amendment. Congress has broad powers under §2 of the Thirteenth Amendment to eliminate all "badges and incidents of servitude," and to decide what these "badges and incidents" are. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Pursuant to that power it can proscribe all employment practices that have a racially discriminatory effect. Since its enforcement powers under §2 of the Thirteenth Amendment are in no way related to "state action," or to providing a remedy for what would otherwise constitute a violation of §1 of the Thirteenth Amendment, it can reach conduct of state and local governments that might not independently be found to be unconstitutional. Nor are there considerations of "state sovereignty" that can affect the exercise of Congress' enforcement power under the Civil War Amendments. Fitzpatrick v. Bitzer, ___ U.S. ___, 49 L.Ed.2d 614 (1976).

D. Under the powers granted to Congress by §5 of the Fourteenth Amendment, Congress can proscribe employment practices by state and local governments that have a racially discriminatory effect on blacks without regard to whether these practices independently would be found unconstitutional by the courts as having been motivated by an intent to discriminate.

The power of Congress under §5 of the Fourteenth Amendment is not limited to providing a remedy for what independently would be found by the courts to be violation of §1 of the Fourteenth Amendment. Katzenbach v. Morgan, 384 U.S. 641 (1966). When Congress acts under its Fourteenth Amendment enforcement powers, and by such action does not contravene a specific constitutional limitation on congressional power, c.f., Oregon v. Mitchell, 400 U.S. 112 (1970), the sole question for the Court is whether the legislation represents a "necessary and proper" exercise of that power. Katzenbach v. Morgan, supra. The prohibition of employment practices that have a racially discriminatory effect is clearly a "necessary and proper" exercise of Congress' Fourteenth Amendment enforcement powers, since it is "not prohibited by but is consistent with 'the letter and spirit of the Constitution.'" Katzenbach v. Morgan, supra.

I.

THE COURT OF APPEALS WAS JUSTIFIED IN FINDING THAT HAZELWOOD HAD ENGAGED IN INTENTIONAL RACIAL DISCRIMINATION IN THE HIRING OF ITS TEACHERS.

The petitioner argues, in effect, that since the United States did not make out a case of intentional constitutional discrimination within the meaning of Washington v. Davis, 426 U.S. 229 (1976) and Village of Arlington Heights v. Metropolitan Housing Development Corporation, ___ U.S. ___, 45 U.S.L.W. 4073 (Jan. 11, 1977), then this Court must resolve the more difficult issues concerning the application of Title VII to state and local governments. We submit that those latter issues need not be reached, because under the standards required for a showing of purposeful discrimination, as identified in Washington, Arlington Heights, and most recently in Casteneda v. Partida, ___ U.S. ___, 45 U.S.L.W. 4302 (March 23, 1977), the Court of Appeals was clearly justified in finding that Hazelwood had engaged in intentional racial discrimination in the hiring of its teachers. Since this is so, it is not necessary to consider any questions relating to the power of Congress to prohibit practices that might not independently be found by the courts to amount to a constitutional violation. Similarly, since the evidence establishes that Hazelwood was guilty of a constitutional violation, this case is not an

appropriate vehicle for this Court to consider any questions relating to the standard of proof necessary to make out a Title VII violation. This being so, the amicus curiae would respectfully suggest that the writ of certiorari be dismissed as having been improvidently granted.

Hazelwood argues that proof of a racially discriminatory purpose, which is required to sustain a constitutional violation, "ordinarily cannot be inferred from statistics showing a racially discriminatory effect alone." (Pet. Cert., p. 9). While this statement reflects this Court's recent decisions, it does not resolve the issues in this case. For this Court has made clear, most recently in Casteneda v. Partida, that although a disproportionate impact alone will normally not be sufficient to establish a case of purposeful discrimination under the Constitution, a relevant statistical disparity with respect to a minority group, coupled with other factors, will be adequate to show a constitutional violation. In Casteneda v. Partida, a jury discrimination case, the Court held that where there is statistical evidence of "substantial under-representation," and there is "a selection procedure that is susceptible to abuse or not racially neutral," that procedure "supports the presumption of discrimination raised by the statistical showing." 45 U.S.L.W. at 4305. "Once the defendant has shown substantial under-representation of

his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case." Ibid. And in Arlington Heights, the court noted that one of the factors which could be looked to, beyond statistical disparity, was the "historical background" of the challenged governmental decision.

We submit that in this case such additional factors are present and, when combined with the statistical showing, support the finding of purposeful racial discrimination. Here, the presumption of discriminatory purpose was buttressed by evidence of pre-Title VII racial discrimination in Hazelwood's hiring of teachers, by evidence showing the rejection of particular black applicants in favor of less-qualified white ones, and by the existence of selection criteria which were highly subjective. As the Court of Appeals held: "...the statistical evidence demonstrating a disparity between the proportion of blacks in Hazelwood's work force and the proportion of blacks in the relevant labor market, when considered in light of Hazelwood's hiring procedures involving the use of vague and subjective criteria, indicate a prima facie case of a pattern or practice of employment discrimination in violation of Title VII." 534 F.2d at 805. The Court then also pointed to the history of pre-Title VII discrimination and the rejection of 16 better-qualified black applicants. Therefore, the Court

of Appeals did not rely solely on disparate impact, as was the case in Washington v. Davis, but found the existence of racial discrimination on the basis of a number of factors. That approach was perfectly consistent with the teaching of Washington, Arlington Heights, and Casteneda with respect to proof of purposeful discrimination violative of the Constitution. For that reason, questions of the appropriate reach of the 1972 amendments to Title VII beyond that need not be addressed.

Those issues need not be reached for another reason. The evidence in the record - in this instance the evidence introduced by Hazelwood itself - conclusively established an intent to discriminate. Stated simply, Hazelwood was imposing a maximum quota on the percentage of black teachers it would hire, limiting that percentage to the percentage of black students enrolled in the Hazelwood system. A more flagrant showing of discriminatory purpose cannot be imagined. The only problem here was that neither Hazelwood nor the District Court apparently realized that this practice amounted to purposeful racial discrimination, and the Court of Appeals as well failed to give sufficient weight to the exact correlation between the percentage of black teachers and the percentage of black students in the Hazelwood school system.

What the Constitution - as well as Title VII - requires is that blacks have

the same opportunity for governmental employment as do whites. To limit the opportunity of black teachers to be employed in the Hazelwood school system by the percentage of black students enrolled in that system - to impose a maximum quota upon the employment of black teachers - is the most flagrant example of racially discriminatory purpose that can be imagined. Indeed, even in systems that have been found guilty of practicing de jure segregation, all teachers must be hired on a non-discriminatory basis without regard to the black-white student composition of the district as a whole, and assigned to schools in proportion to the black-white teacher ratio without regard to the black-white student composition of the school to which they are assigned. United States v. Montgomery County Board of Education, 395 U.S. 225 (1969). The imposition of a maximum quota on the percentage of black teachers that would be hired by Hazelwood is so clearly unconstitutional that in the present case any reliance on workforce statistical disparity was completely unnecessary.

Far from condemning the imposition of a maximum quota and the failure to hire teachers without regard to race, however, the District Court relied on the fact that the percentage of black teachers employed by Hazelwood coincided exactly with the percentage of black students in attendance as a basis for finding that Hazelwood was not practicing racial discrimination. It

noted that in 1970-71, the six black teachers hired by Hazelwood comprised less than one percent of its total faculty, but that, "the number of black students enrolled during that period was likewise only one percent of the total district attendance." 392 F.Supp. at 1287. It then noted that, "In 1973 the ratio of black teachers increased to 2%, consistent with a black enrollment in that year of 576 out of 25,166 total students." Id. It concluded that, "These figures do not establish the existence of statistical discrimination within the Hazelwood district." Id. at 1287-1288. This conclusion is plainly incredible and can be explained in no other way than being the result of a complete misunderstanding of the elementary legal principles applicable to claims of racial discrimination. The Court of Appeals similarly failed to appreciate the significance of this evidence and discounted it, observing that, "The level of black student enrollment in Hazelwood schools sheds no light whatsoever upon the dispute before us, and the district court clearly erred in absolving Hazelwood of unlawful employment practices on the basis of the paucity of black students in the Hazelwood schools." 534 F.2d at 812.

With all due respect to the Court of Appeals, the level of black teacher employment in Hazelwood, when tied inextricably to the level of black student enrollment, indeed "sheds light upon the dispute before us." It establishes conclusively that

Hazelwood was practicing the most flagrant form of intentional, deliberate and calculated racial discrimination in the hiring of its teachers. It also provides an explanation for why Hazelwood did not hire the 16 black teachers found by the Court of Appeals to have been rejected in favor of whites with lesser qualifications. Hazelwood had already reached its "black quota," and until more black students enrolled in Hazelwood, there would be no increase in the number of black teachers. The District Court not only erred in "absolving Hazelwood of unlawful employment practices on the basis of the paucity of black students in the Hazelwood schools." It erred more seriously - and in this respect so did the Court of Appeals - in not condemning forthwith the racial discrimination that was "as plain as the nose on one's face."

Since the undisputed evidence, totally apart from the statistical workforce disparity, conclusively establishes that Hazelwood was guilty of practicing the most flagrant form of racial discrimination in the hiring of its teachers - the imposition of a maximum quota on the percentage of black teachers that would be hired - there is no issue of substance to be reviewed by this Court, and the writ of certiorari should be dismissed as having been improvidently granted.

II.

IT IS WITHIN THE POWER OF CONGRESS TO PROHIBIT WHAT IT HAS FOUND TO CONSTITUTE RACIAL DISCRIMINATION IN EMPLOYMENT WHEN PRACTICED BY STATE AND LOCAL GOVERNMENTS IN THE SAME MANNER AS WHEN PRACTICED BY PRIVATE EMPLOYERS.

A. The implementation of the national policy established by Congress with respect to equal employment opportunity requires that this policy be fully applicable to the employment practices of state and local governments.

The national policy established by Congress under Title VII was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees;" Title VII requires the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Griggs v. Duke Power Co., 401 U.S. 424, 429, 431 (1971). By the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e(a), Congress extended this national policy to the employment practices of state and local governments, and viewed this extension as crucial if that national policy were ever to be implemented fully. As

was noted in the Report of the House Education and Labor Committee, House Report No. 92-238, U. S. Code Cong. & Admin. News, 92nd Cong., vol. 2, 2137, as of 1971, approximately 10.1 million persons were employed by state and local governmental units, an increase of over 2 million employees since 1964, and employees of state and local governments constituted the only large group of employees in the nation who were almost entirely exempt from federal non-discrimination protections. The Committee Report documented the widespread discrimination against blacks and other racial minorities in state and local governmental employment, and concluded that this discrimination was inconsistent with the national policy of equal employment opportunity. Id. at 2153. It also observed that:

> "The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people equally is negated." Id. at 2153.

In order to implement fully the national policy with respect to equal employment

opportunity, it was clearly necessary that state and local governments be included within the provisions of Title VII in the same manner as private employers. The power of Congress to subject state and local governments to the provisions of Title VII was recognized by this Court in Fitzpatrick v. Bitzer, ___ U.S. ___, 49 L.Ed.2d 614 (1976), when it held that the Eleventh Amendment presented no obstacle to the award of back pay and attorneys fees against the states in a Title VII action.

The serious implications for the implementation of this national policy that would result if Hazelwood's position were accepted by this Court are frankly stated in Hazelwood's observation that, "There is no doubt that such a showing of statistical disparity as was made in Hazelwood's case would, if the statistical analysis were valid, support a finding of a prima facie violation of Title VII by an employer than a state body," and its resulting argument that this showing of statistical disparity cannot constitutionally be applied to Hazelwood because it is a state agency. (Pet. Cert., pp. 8-10). The key to the implementation of the national policy reflected in Title VII is the elimination of employment practices that have a racially discriminatory effect. As this Court stated in Griggs, "The Act proscribes not only overt discrimination but also practices that are fair in form,

but discriminatory in operation." 401 U.S. at 431. And as it also noted in that case, "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." Id. at 432.

There are three levels of discrimination proscribed by Title VII: (1) First-level or overt discrimination, such as refusal to hire or to promote on the basis of race, which is often indicated by evidence showing a statistical disparity between the percentage of blacks in the workforce and the percentage of blacks employed by the employer. See e.g., Robinson v. Union Carbide Corp., 538 F.2d 652 (5th Cir. 1976); (2) Second-level discrimination, such as the use of facially neutral, but non-job-related tests or other conditions of employment that operate disproportionately to exclude blacks. See e.g., Griggs v. Duke Power Co., supra; Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); (3) Third-level discrimination, such as the maintenance of seniority systems that "lock in" the victims of prior discrimination. See e.g., Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974).

The thrust of Hazelwood's argument, if accepted by this Court, would be to make Title VII completely inoperative to prevent second and third level discrimination by state and local governments.

Hazelwood asks the Court to decide that Congress does not have the power to prohibit employment practices of agencies of state and local governments "in the absence of proof that the agency purposely discriminated against applicants on the basis of race." (Pet. Br., p. 3). If the Court so holds, then the principles established in Griggs and Albemarle and in other Title VII cases decided by this Court and by the lower federal courts, invalidating second and third level discrimination, would simply be inapplicable to the employment practices of state and local governments, and instead of a uniform national policy with respect to equal employment opportunity, there would be one standard for private employers and an entirely different standard for state and local governments. Private employers could not use practices that are "fair in form, but discriminatory in operation," Griggs at 431, such as tests and conditions of employment that were not job-related and disproportionately excluded blacks, but state and local governments would be free to reimpose all "artificial, arbitrary, and unnecessary barriers of employment," id., so long as it could not be shown that they had done so with the "intent to discriminate." They could require, for example, that all laborers be high school graduates, even though there is no reasonable relationship between a high school education and the requirements of a laborer's job, and even though this

would operate to disproportionatly exclude blacks, who have a substantially lower rate of high school education as a group than whites. They could also continue to use civil service examinations that are not job-related and that disproportionately exclude blacks.

In short, if this Court were to accept Hazelwood's argument, a great number of the employment practices found to be violative of Title VII when engaged in by private employers would go beyond the power of the Congress to proscribe when engaged in by state and local governments. All that Congress could prohibit state and local governments from doing would be engaging in intentional discrimination. Since such intentional discrimination when engaged in by state and local governments is itself violative of the Fourteenth Amendment, Washington v. Davis, 426 U.S. 229 (1976), and would be actionable under 42 U.S.C. §1983, Title VII would be substantively negated, and the objective of Congress sought to be achieved by the enactment of the Equal Opportunity Act of 1972 - to make state and local governments subject to the national policy of equal employment opportunity emobidied in Title VII - would crash upon the rocks of "intent to discriminate." The Equal Opportunity Act of 1972 would turn out to have done no more than to provide Title VII enforcement mechanism and remedies for what otherwise would be a violation of 42 U.S.C. §1983. Since

the courts have broad enforcement powers to remedy a violation of 42 U.S.C. §1983 in any event, see e.g., Carter v. Gallagher, 452 F.2d 315 (8th Cir.), cert. denied, 406 U.S. 950 (1972), all of the congressional "straining" reflected in the enactment of the Equal Employment Opportunity Act of 1972 would have indeed "brought forth a gnat."

Hazelwood should have a heavy burden to persuade this Court that Congress lacks the constitutional power to prohibit racial discrimination in employment on the part of state and local governments beyond that which is now prohibited by the equal protection clause itself and actionable under 42 U.S.C. §1983. It should have a heavy burden to persuade this Court that Congress cannot require the elimination by state and local governments of all "artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Griggs at 431. It should have a heavy burden to persuade this Court that the Constitution prevents the Congress from proscribing what it has found to constitute racial discrimination in employment when practiced by state and local governments in the same manner as when practiced by private employers. The broad discretion of the Congress that this Court has traditionally recognized when Congress acts to exercise its enumerated powers, whether enumerated in Art.

I, §8, or in the implementing clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments, see e.g., Katzenbach v. Morgan, 384 U.S. 641, 650-651 (1966), dictates that careful consideration be given to whether Congress may, under the exercise of any of its enumerated powers, proscribe what it has found to constitute racial discrimination in employment when practiced by state and local governments in the same manner as when it is practiced by private employers.

It is the position of the amicus curiae that the application to state and local governments of the substantive provisions of Title VII is a necessary and proper exercise of the enumerated powers granted to Congress under the commerce clause of Art. I, §8, under §2 of the Thirteenth Amendment, insofar as Title VII prohibits discrimination on the basis of race, and under §5 of the Fourteenth Amendment.

B. Congress may, under the commerce power, prohibit what it has found to constitute racial discrimination in employment when practiced by state and local governments in the same manner as when practiced by private employers, since such prohibition does not create an impermissible interference with the exercise of "sovereignty" by state and local governments.

There can be no question, of course, that when acting under the commerce power Congress is not limited to prohibiting what otherwise would be a constitutional violation on the part of state and local governments. Fry v. United States, 421 U.S. 542 (1975); United States v. California, 297 U.S. 175 (1936). In National League of Cities v. Usery, 426 U.S. 833 (1976), this Court carved out a limited exception to the otherwise plenary power of Congress over interstate commerce where state and local governments are involved. This "state sovereignty" exception is that, "Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S. at 855 (emphasis added). In that case the application of federal wage and hours requirements to state and local governments was held to be violative of "state sovereignty," because it would impose substantial increased costs on the carrying out of governmental functions, possibly to the point of requiring the relinquishment of certain governmental activities, 426 U.S. at 846-847, and more importantly perhaps, because it would "displace state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." Id. at 847.

Hazelwood says that in Usery, this Court held that Congress is not empowered under the commerce power to "impose on states acting 'in their capacities as sovereign governments,' rules governing the way they treat their employees," (Pet Cert., p. 8), and that, therefore, "Title VII of the Civil Rights Act cannot be defended as an exercise of the commerce power when the act is applied to states and their local subdivisions." (Id.). This Court held no such thing. It limited its decision in that case to the authority of Congress to prescribe minimum wages and maximum hours for state employees, noting that, "One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees will be called upon to work overtime." 426 U.S. at 845. As it specifically stated, "We hold that insofar as the challenged amendments operate directly to displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, §8, cl. 3." Id. at 852.

The prohibitions of Title VII, however, do not "operate directly to displace the States' freedom to structure integral operations in areas of tradi-

tional governmental functions." The exercise of "state sovereignty" does not require that the states practice what Congress has found to constitute racial discrimination. The "freedom to structure integral operations" does not require that the states impose "artificial, arbitrary and unnecessary barriers that operate invidiously to discriminate on the basis of racial or other impermissible classification." Griggs v. Duke Power Co., supra at 431. All that Title VII mandates is that hiring be "on the basis of job qualifications rather than on the basis of race or color." Griggs at 434. If anything, compliance with its provisions will serve to benefit state and local governments by insuring that they hire the most qualified person for the job and do not impose artificial barriers to employment that will deny jobs to the most qualified person, much in the same manner as the wage freeze in Fry benefited the states by reducing pressures upon state budgets. Since the requirements of Title VII do not improperly interfere with "state sovereignty," they do not come within the limited exception to the otherwise plenary authority of Congress under the commerce power, as set forth in Usery, and the federal government can apply them to the states in the same manner as it can apply them to private employers. Fry v. United States, supra; United States v. California, supra.

Racial discrimination, moreover, is a national problem and requires a national and uniform solution. Even if "state sovereignty" could somehow be construed as including the right to practice what Congress has found to constitute racial discrimination, it would be inconsistent with the need for national and uniform solution to the problem to exempt state and local governments from compliance with the federal standards. In Usery, this Court adopted a balancing approach in determining the constitutionality of a congressional enactment under the commerce power that interfered with the exercise of "state sovereignty," and the holding there was not intended to foreclose the exercise of federal power where "the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." 426 U.S. at 856 (Blackmun, J., concurring). Although Justice Blackmun was speaking of environmental protection, the need for a national and uniform solution in the area of racial discrimination in employment and for compliance with federal standards by state and local governments is equally apparent. It would be utterly inexplicable, both to racial minorities and to the public at large, if state and local governments could engage in what Congress has found to be racially discriminatory practices that were proscribed for private employers. It would undercut the moral message of Title VII, that there is to be

equality of employment opportunity for all persons, and that all "artificial, arbitrary and unnecessary barriers" shall be removed.

Finally, as in Fry, the conditions making necessary the enactment of Title VII and of the Equal Employment Opportunity Act of 1972 hopefully will some day come to an end. As this Court stated in Usery, "The limits imposed upon the commerce power when Congress seeks to apply it to the states are not so inflexible as to preclude temporary enactments tailored to combat a national emergency." 426 U.S. at 853. While obviously Title VII is different in duration at least from the kind of enactment involved in Fry, that principle is still relevant here. Unlike minimum wage and maximum hours requirements, Title VII does not by its own force impose continuing demands upon state and local governments. Indeed, by ending disriminatory employment practices, state and local governments can avoid federal interference entirely. Once racial discrimination in employment has come to an end, once all "artificial, arbitrary and unnecessary barriers" to employment have been removed, the necessity for the enforcement of Title VII and the alleged interference with "state sovereignty" will have ceased to exist.

The application of Title VII to state and local governments, therefore, is clearly a "necessary and proper" exer-

cise of the commerce power, and considerations of "state sovereignty" do not preclude its application to state and local governments in the same manner as it is applied to private employers.

C. Insofar as Title VII prohibits discrimination on the basis of race, it may be sustained in its application to state and local governments under the powers granted to Congress by §2 of the Thirteenth Amendment.

It is, of course, within the powers granted to Congress under §2 of the Thirteenth Amendment to prohibit racial discrimination in employment. Johnson v. Railway Express Agency, 421 U.S. 454 (1975); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 223 (1976). Whenever Congress acts under its Thirteenth Amendment enforcement powers, the "congruence problem" that Hazelwood argues exists when Congress acts under its Fourteenth Amendment enforcement powers is completely absent. The power of Congress to prohibit employment practices on the part of state and local governments that have a racially discriminatory effect clearly can be sustained under §2 of the Thirteenth Amendment.

The power granted to Congress under §2 of the Thirteenth Amendment is the power to eliminate all "badges and incidents of servitude," Jones v. Alfred H.

Mayer Co., 392 U.S. 409, 440 (1968), and as this Court there stated, "Surely Congress has the power to decide what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." Pursuant to this power, it can decide that employment practices which have a racially discriminatory effect are "badges and incidents of slavery," and proscribe their use. Insofar as Title VII prohibits employment discrimination on the basis of race, it should be deemed to have been enacted by Congress pursuant to the powers granted to it by §2 of the Thirteenth Amendment, on the same basis as it has enacted the provisions of 42 U.S.C. §1981.

When Congress acts pursuant to §2 of the Thirteenth Amendment, the "congruence problem," alleged to exist when Congress acts pursuant to §5 of the Fourteenth Amendment, disappears completely, because the enforcement powers of §2 of the Thirteenth Amendment are in no way related to "state action" or to providing a remedy for what would otherwise constitute a violation of §1 of the Thirteenth Amendment. Thus, although racial discrimination practiced by private persons is not violative of §1 of the Thirteenth Amendment or of the Fourteenth Amendment, Civil Rights Cases, 109 U.S. 3 (1883), Congress can prohibit such discrimination by exercising the power granted to it under §2 of the Thirteenth

Amendment. Jones v. Alfred H. Mayer Co., supra. As this Court emphasized in Jones: "As its text reveals, the Thirteenth Amendment 'is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.'... If Congress has the power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals." 392 U.S. at 438-439. Under §2 of the Thirteenth Amendment, Congress has the power to eliminate all racial barriers, whether imposed by private persons or by state and local governments, and its power to do so is in no way affected by whether the action proscribed would, if practiced by state or local governments, be itself violative of §1 of the Thirteenth Amendment.

Nor can the exercise of the power of Congress under §2 of the Thirteenth Amendment remotely be affected by considerations of "state sovereignty." While the Tenth Amendment may be seen as imposing "state sovereignty" considerations on the exercise of the powers granted to Congress by Art. I, §8,

National League of Cities v. Usery, supra, it cannot, any more than the Eleventh Amendment, affect the exercise of powers granted to Congress by the Civil War amendments. Fitzpatrick v. Bitzer, supra. As this Court there stated, in the context of analyzing congressional power under §5 of the Fourteenth Amendment:

> "There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers - with the corresponding diminution of state sovereignty--found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments..." 49 L.Ed.2d at 621.

Since Congress has the power under the Thirteenth Amendment to proscribe all "badges and incidents of servitude," and to decide what those "badges and incidents" are, it can prohibit all employment practices of the state and local governments that have a racially discriminatory effect, without regard to whether those practices independently would be unconstitutional as having been motivated by "racially discriminatory intent." The application of

Title VII to Hazelwood in the case at bar, therefore, clearly can be sustained as a proper exercise of the powers granted to Congress under §2 of the Thirteenth Amendment.

D. Under the powers granted to Congress by §5 of the Fourteenth Amendment, Congress can proscribe employment practices by state and local governments that have a racially discriminatory effect on blacks without regard to whether these practices independently would be found unconstitutional by the courts as having been motivated by an intent to discriminate.

The essential thrust of Hazelwood's "congruence argument" is that the power of Congress under §5 of the Fourteenth Amendment is limited to providing a remedy for what independently would be found by the courts to be a violation of §1 of the Fourteenth Amendment. Since, it is argued, there is no constitutional violation in the absence of a showing of intent to discriminate, as defined by this Court in Washington v. Davis, 426 U.S. 229 (1976), and Village of Arlington Heights v. Metropolitan Housing Development Corp., ___U.S.___, 50 L.Ed.2d 450 (1977), Congress cannot proscribe employment practices by state and local governments that have a racially discriminatory effect in the absence of a showing of intent to discriminate. Brief

for Petitioner, pp. 23-32.

An analytically indistinguishable argument was made and emphatically rejected in Katzenbach v. Morgan, 384 U.S. 641 (1966):

> "The Attorney General of the State of New York argues that an exercise of congressional power under §5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that §4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides--even with the guidance of a congressional judgment--that the application of the English literacy requirement prohibited by §4(e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of §5 supports such a construction. ... A construction of §5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of §1 of the Amendment." 384 U.S. at 648-649.

Therefore, although the use of literacy tests had been held not necessarily to be violative of the Fourteenth and Fifteenth Amendments, Lassiter v. Northampton Election Board, 360 U.S. 45 (1959), that consideration was irrelevant in Katzenbach, since Congress had, in the exercise of its powers under §5 of the Fourteenth Amendment, proscribed their use. The only question that the Court had to decide then was whether this proscription constituted a "necessary and proper" exercise of Congress' power under §5 of the Fourteenth Amendment, Id. at 649-650, and this Court held that it did. Id. at 652-658.

Hazelwood argues that Katzenbach "is fairly read to mean only that where an informed and proper basis exists for Congress to determine that specific state

conduct in fact violates the equal protection clause, a congressional prohibition of that conduct may be sustained under Section 5 without this Court's having fully to satisfy itself that it would necessarily reach the same decision unaided by the congressional judgment." Brief for Petitioner, p. 34. As the above-quoted language from Katzenbach demonstrates, this reading of the case is plainly wrong. This Court specifically rejected the argument that the power of Congress under §5 of the Fourteenth Amendment was limited to "informing the judgment of the judiciary by particularizing the 'majestic generalities' of §1 of the Amendment," and declined even to consider the question of whether the application of the English literacy requirement - "even with the guidance of a congressional judgment" - violated the equal protection clause.

The language in Katzenbach quoted by Hazelwood was contained in a discussion of whether the proscription against the use of literacy tests constituted a "necessary and proper" exercise of Congress' power under §5 of the Fourteenth Amendment - which was the only question this Court had to decide - and came after this Court had specifically rejected the "congruence argument" that Hazelwood is again advancing here. To put it another way, in Katzenbach, this Court held that Congress, as well as the courts, had the power under §5 of the Fourteenth Amendment, to decide what it thought constituted "invidious discrimination" in violation of the equal protection clause and to enlarge on what had been held judicially to be unconstitutional. This Court would not substitute its judgment for that of the Congress - and thus it was irrelevant that the Court had upheld the constitutionality of the literacy test involved in Lassister - but would only consider whether the legislation designed to enforce the equal protection clause was "plainly adapted to that end," and whether it was "not prohibited by but is consistent with 'the letter and spirit of the Constitution.'" 384 U.S. at 651. If the legislation satisfied these criteria, it was a "necessary and proper" exercise of the powers granted to Congress under §5 of the Fourteenth Amendment.

The affirmative role of Congress in proscribing practices that it considers to be inconsistent with the guarantees of the Fourteenth Amendment - totally apart from whether what Congress has proscribed independently would be found unconstitutional by the courts - to enlarge on the Fourteenth Amendment, so to speak, was long ago recognized by this Court. As it stated in Ex parte Virginia, 100 U.S. 339, 345-356 (1879):

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the pro-

> hibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."

It was this principle that was applied in Katzenbach and again in Oregon v. Mitchell, 400 U.S. 112 (1970), where this Court sustained the power of Congress, in the view of some Members of the Court, under §5 of the Fourteenth Amendment, and in the view of other Members of the Court, under §2 of the Fifteenth Amendment, to impose a nationwide ban on the use of literacy tests, even though there were no state-by-state findings showing the discriminatory use of literacy tests to disenfranchise blacks. 400 U.S. at 284 (Opinion of Stewart, J.). Similarly in that case this Court sustained the power of Congress under §5 of the Fourteenth Amendment to proscribe durational residency requirements for voting in Presidential elections, although such requirements had not at that time been held independently to be violative of the Fourteenth Amendment. C.f., Dunn v. Blumstein, 405 U.S. 331 (1972).

Of course, the power of Congress under §5 of the Fourteenth Amendment, like any other power, is not without its limits. It can be used only to enlarge on the Fourteenth Amendment rights that have been

judicially recognized, not to dilute them. Katzenbach v. Morgan, at 651-652, n. 10. Congress cannot in the exercise of that power "overstep the letter or spirit of any constitutional restriction." Oregon v. Mitchell, at 287 (Opinion of Stewart, J.). Nor can it violate any provisions of the Bill of Rights. Katzenbach v. Morgan, at 656-658. In any of these circumstances, the legislation would not be a "necessary and proper" exercise of the powers granted by §5. But in all other circumstances, the broad discretion of Congress under the "necessary and proper" clause applies with equal force to the exercise of its powers granted by §5, and Congress is not circumscribed, as Hazelwood contends, to prohibiting only what would be found by the courts independently to constitute a violation of the Fourteenth Amendment.

There can be no question that Congress had a "rational basis" for concluding that employment practices having a racially discriminatory effect on blacks and other racial minorities were inconsistent with the "letter and spirit of the Constitution." The power of Congress under §5 of the Fourteenth Amendment to insure full equality for blacks in American society surely extends to requiring the removal by state and local governments of all "artificial, arbitrary and unnecessary barriers to employment," and it was entitled to exercise that power with respect to the "consequences of employment

practices, not merely the motivation." As applied to state and local governments, therefore, Title VII, in all of its aspects, can be sustained as a "necessary and proper" exercise of the power granted to Congress by §5 of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed, or in the alternative, the writ of certiorari should be dismissed as having been improvidently granted.

Respectfully submitted,

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April, 1977